

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE FOR THE TWENTY-
SECOND JUDICIAL DISTRICT AT LAWRENCEBURG

STATE OF TENNESSEE,
Plaintiff,

v.

TOM SMITH, d/b/a BODY
WORKS II,

Respondents

AGREED FINAL JUDGEMENT

Plaintiff, the State of Tennessee, by and through John Knox Walkup, Attorney General & Reporter, on behalf of the Division of Consumer Affairs of the Department of Commerce and Insurance (hereinafter the "State"), and Defendant, Tom Smith d/b/a Body Works II, doing business in Lawrenceburg, Tennessee, as evidenced by their signatures, do consent to the entry of this Judgment ("Order") and its provisions. Defendant enters into this Order solely to avoid the time and expense associated with litigation. This is an Agreed Final Judgment for which execution may issue. This Order only resolves matters set forth in the State's Complaint. Defendant hereby accepts and expressly waives any defect in connection with service of process issued on the Defendant by the State.

1. JURISDICTION

1.1 Jurisdiction of this Court over the subject matter and over Defendant for the purpose of entering into and enforcing this Order is admitted. Jurisdiction is retained by this Court for the purpose of enabling the State to apply to this Court for such further orders and directions as may be necessary or appropriate for the construction, modification or execution of this Order, including the enforcement of compliance therewith and imposition of penalties for violation thereof. Defendant agrees to pay all court costs and attorneys' fees associated with any petitions to enforce any provision of this Order against Defendant.

2. VENUE

2.1 Pursuant to Tenn. Code Ann. § 47-18-108(a)(3), venue as to all matters between the parties relating hereto or arising out of this Order is solely in the Chancery Court of Lawrence County, Tennessee.

3. PARTIES

3.1 Defendant, Tom Smith, d/b/a Body Works II warrants and represents that he is the proper party to this Order. Defendant further acknowledges that he understands that the State expressly relies upon this representation and warranty, and that if it is false, misleading or inaccurate, the State has the right to vacate or set aside this Order, and request that Defendant be held in contempt, if the State so elects.

3.2 Defendant represents that "Tom Smith d/b/a Body Works II" is the true legal name of the entity entering into this Order. Defendant understands that the State expressly relies upon this representation and if it is false, inaccurate or misleading the State has the right to vacate or set aside this Order, and request that Defendant be held in contempt, if the State so elects.

4. INJUNCTIVE RELIEF

Accordingly, it is hereby agreed by Defendant that immediately upon the execution of this Order, he shall be permanently and forever enjoined and bound from directly or indirectly engaging in the practices set forth herein.

4.1 Defendant shall not, directly or indirectly, engage in any unfair, misleading or deceptive acts or practices in the conduct of its business. Defendant shall abide by all provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101, et seq., ("T.C.P.A."), including, but not limited to, the sections of the Act regulating health clubs, Tenn. Code Ann. § 47-18-301 through § 47-18-320 ("the Health Club Act").

4.2 Within ten (10) days of entry of this Order, Defendant shall apply for registration with the Division of Consumer Affairs (hereinafter "Division"), if not already registered. Defendant's application shall include contracts and/or agreements that comply with the TCPA, including the Health Club Act. Defendant shall make a good faith effort to obtain registration within ninety (90) days of entry of this Order, if not already registered.

4.3 Defendant shall not directly or indirectly, own, operate, manage, promote or be employed by a health club as defined by the Health Club Act in the State of Tennessee, unless the health club is in full compliance with the Health Club Act.

4.4 Defendant shall be prohibited from directly or indirectly, representing, advertising, promoting or stating that any membership agreements are enforceable against consumers. Unenforceable membership

agreements are those agreements which were signed by consumers during the periods of time that Body Works II were operating without a valid certificate of registration from the Division.

4.5 Defendant shall not, directly or indirectly, represent, state, promote, advertise or claim that goods or services are of a particular standard, quality or grade, if they are of another.

4.6 Defendant shall not, directly or indirectly, represent, state, promote, advertise or claim that a consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law.

4.7 Defendant shall make and retain contemporaneous records of all consumer complaints or inquiries made orally or by telephone and shall make such records available to the State upon request.

4.8 Defendant shall retain in an organized fashion all written material containing or representing consumer complaints or inquiries and make such materials available to the State upon request.

4.9 Neither Defendant nor anyone acting on his/its behalf shall directly or indirectly, state, represent or cause to be stated that the Attorney General, the Division of Consumer Affairs, or any other governmental unit of the State of Tennessee approved, sanctioned, or authorized any practice, act, or conduct of the Defendant.

4.10 Defendant shall not directly or indirectly, represent or state that any procedure or other acts or practices hereafter used or engaged in by Defendant has been approved, in whole or in part, by the State.

4.11 Defendant shall allow any consumer who entered into a health club agreement with Body Works II, when Defendant's health club was not registered with the Division, to cancel that agreement without further obligation to Defendant.

4.12 Defendant shall refund to any consumer who cancels an agreement as provided in Section 5 that portion of any down payment, enrollment fee, membership fee, or other fee that does not represent payment for actual use of the facilities and goods and services actually provided.

4.13 Defendant shall be prohibited from directly or indirectly, attempting to collect or collecting against any consumer or unenforceable membership agreements. Without limiting the scope of this section, Defendant shall be required to notify all collection agencies to cease collection activities if collection efforts have been commenced against a consumer for failure to complete payment under the unenforceable health club agreements.

4.14 Defendant shall be required to affirmatively correct any consumer's credit history or record upon which Defendant or Defendant's agents have reported negative information relating to an unenforceable Body Works II health club agreement. Without limiting the scope of this section, Defendant shall provide a copy of the affirmative correction to the affected consumer for their records and make these records

available to the State, upon request.

5.1 RESTITUTION

Defendant shall permit all consumers to cancel their unenforceable membership agreements and receive a refund, as set forth herein, that portion of any down payment, enrollment fee, membership fee, or other fee that does not represent payment for actual use of the facilities and for goods and services actually provided. Unenforceable membership agreements are those agreements which were signed by consumers during the period of time that Body Works II was operating without a valid certificate of registration from the Division.

5.2 Defendant shall provide to the Division of Consumer Affairs, contemporaneously with the entry of this Order, an alphabetical list of the names, addresses and telephone numbers of each consumer and amount paid by each consumer who entered into an unenforceable membership agreement with Defendant during the period of non-compliance with the Health Club Act's registration provisions and this list shall be attached as Exhibit A to this Order. Defendant understands that the State expressly relies upon Defendant's representation that the list is complete and accurate, and if this representation is false, inaccurate, deceptive, unfair or misleading, the State has the right to move to vacate or set aside this Order and request that Defendant be held in contempt, if the State so elects.

5.3 For each and every consumer listed in Exhibit A, within fourteen (14) days of entry of this Order, the Defendant shall mail a letter, printed on letterhead chosen at the sole discretion of the Attorney General and Reporter, along with the Membership Agreement Cancellation Form (both attached hereto as Exhibit B). No other materials, including promotional materials, may be included with the mailing of Exhibit B.

5.4 Within thirty (30) days of Defendant's receipt of cancellation notices from the Division of Consumer Affairs, Defendant shall provide the appropriate Notice to each consumer who returned a membership cancellation agreement form. The Notices shall be in the same form as Exhibit C. Defendant shall be required to comply with the terms of the Notices. No other materials, including promotional materials, may be included with the mailing of Exhibit C.

5.5 Further, Defendant shall provide the State with a copy of the notice actually mailed to the consumers and an alphabetical list of the names and addresses to whom it was delivered.

(A) No other materials, including promotional materials, may be included with the mailing of Exhibit C to consumers. Defendant shall also offer, within thirty (30) days of the entry of this Order, this opportunity to obtain a full monetary refund of the entire purchase price of the health club agreement or cancellation of debt, less that portion actually used, if the consumer is dissatisfied for any reason and desires to cancel their health club agreement. (For the purpose of this Order, the purchase price shall include all deposits, fees, taxes and any other charges regardless of the identifying term for such charge which was incurred by the consumer.)

(B) All consumers who make a written request postmarked no later than one hundred and twenty (120) days after the date of the mailing of Exhibit B will receive a full monetary refund for the purchase price of the health club agreement or cancellation of debt, less that portion actually used, unless consumer paid monthly dues. To comply with this section, the consumer refund request must be postmarked within one hundred twenty (120) days of the mailing of Exhibit B to eligible consumers, listed in Exhibit A. All cancellation refunds will be honored regardless of whether they are received by the Defendant or any agency of the State.

(C) The materials required by this section must be mailed via certified first class postage paid mail through the United States Postal Service. The mailing must be sent in envelopes chosen at the sole discretion of the Attorney General & Reporter. All envelopes must be clearly marked "POSTMASTER: ADDRESS CORRECTION REQUESTED" and "IMPORTANT INFORMATION REGARDING CANCELING YOUR HEALTH CLUB AGREEMENT AND IF APPLICABLE, OBTAINING A MONEY REFUND". In the event any envelope is returned with a corrected or forwarding address, Defendant shall again re-mail Exhibit B to the consumer via certified mail through the United States Postal Service at the correct address. For said consumers, the one hundred and twenty (120) day period shall not commence until the date of the second mailing of Exhibit B to the corrected address. No other materials, including promotional materials, may be included with the re-mailing of Exhibit B to consumers, to the exclusion of mailing the Notices, Exhibit C. The Division of Consumer Affairs shall receive written notification of the name, corrected address and date of mailing the second notification to any consumer within five (5) days of mailing the second notice.

(D) Consumer refunds shall be made by check drawn on an account with a sufficient cash balance to fund all refunds and shall not consist of credits, discounts or other partial reimbursement of the purchase price. All consumer refunds shall be mailed by first class certified postage paid United States Mail within three (3) weeks of the receipt of the refund and notice of cancellation request. Envelopes shall be marked "POSTMASTER: ADDRESS CORRECTION REQUESTED" and refunds shall be re-mailed with an address correction, where applicable.

(E) In the event Defendant is unable to locate consumers entitled to a refund, those funds due such consumers shall be treated as unclaimed property in the possession of the State of Tennessee pursuant to the Uniform Disposition of Unclaimed Property Act, Tenn. Code Ann. § 66-29-101, *et seq.* These funds may be delivered to the Treasurer prior to the statutory due date. The Defendant shall provide a report to the Attorney General & Reporter within six (6) months of the entry of the Order which details the amounts delivered to the Treasurer for treatment as unclaimed property under the State statute. The Defendant shall continue to provide this information every six (6) months until all funds have been claimed. The Defendant shall provide all information necessary to the State

Treasurer's Office to appropriately handle such funds as unclaimed property as set forth by statute and regulation.

(F) Defendant is responsible for all costs associated with the refund process set forth in subsection 5, including, but not limited to, all costs associated with mailing, all letterhead, envelopes, copying charges, postage and other costs associated with the issuance of refund checks.

(G) Within six (6) months of entry of this Order, Defendant shall file with the Attorney General the following information and shall supplement the information as is necessary:

1. A report verifying and certifying that eligible consumers who have canceled their health club agreements and who have requested a refund have, in fact, received a full refund and/or cancellation of debt. Additionally, the Defendant shall verify and certify compliance with each provision of this Order with respect to refunds.

2. An alphabetical list of the name and address of each consumer who requested a refund and/or cancellation of debt, the amount of each consumer's refund and/or debt cancellation, if applicable, and the total amount of all refunds and debt cancellations provided.

(H) Within ten (10) days of receipt of a request from the Division of Consumer Affairs for evidence that a specific consumer or consumers have received Exhibit C, Defendant shall provide any documents, books and/or records necessary to establish to the satisfaction of the Director of the Division of Consumer Affairs that the refund process complied with this Order. These documents may include, but shall not be limited to, copies of the front and back of canceled checks and/or mailing records along with certified mail receipts indicating that the identified consumer or consumers received the Exhibit and/or a refund. The documents, books or records shall be physically turned over and provided to the Division of Consumer Affairs' offices no later than ten (10) days from receipt of such request. This paragraph shall in no way limit the Attorney General's or the Division of Consumer Affairs' right to obtain documents, records and/or testimony through any other state or federal law, regulation or rule.

6. PAYMENT OF ATTORNEYS' FEES AND COSTS TO THE STATE

6.1 Defendant shall pay the sum of Eight Hundred Dollars (\$800.00) to the State of Tennessee to reimburse the State for attorneys' fees and costs of investigation, prosecution and monitoring for compliance of this matter, which may be used for consumer protection purposes at the sole discretion of the Attorney General. Defendant shall provide payment as set forth in section 8 of this Order.

7. CIVIL PENALTIES

7.1 Defendant shall pay the sum of Two Thousand Two Hundred and 00/00 Dollars (\$2,200.00) to the State of Tennessee as civil penalties for Defendant's violations of the Tennessee Consumer Protection Act. Defendant shall provide payment as set forth in Section 8 of this Order.

8. FORBEARANCE ON EXECUTION AND DEFAULT

8.1 No execution or garnishments to collect the monetary payments set forth in this Order shall issue so long as the Defendant makes timely payments as set forth in this section.

8.2. In the event Defendant fails to make any such payment within thirty (30) days of its due date, the entire balance of all provisions of this Order then remaining may be collected by execution, garnishment or other legal process, together with attorneys fees associated with collection and interest pursuant to Tenn. Code Ann. § 47-14-121, from the date of entry of this Order. Defendant agrees to pay attorneys' fees and costs associated with any such collection efforts.

8.3 Payments shall be made to the Consumer Protection Division, Office of the Attorney General as follows: the Defendant shall make an initial payment of One Hundred Dollars and 00/100 Cents (\$10.00) on the day of entry of this Order, after that the Defendant shall pay the sum of One Hundred Dollars and 00/100 Cents (\$100.00) per month on the first day of each month thereafter until the entire balance is paid in full.

8.4 Defendant shall be required to retain proof of all payments to the State in the form of canceled checks or receipts from the financial institution from which he obtained cashier's checks, for each payment for a full 24 months following his final payment to the State. Defendant shall provide proof of all payments to the State within 10 days of a request for such information.

8.5 Defendant agrees that any and all such sums are nondischargeable in a bankruptcy proceeding given the same are punitive in nature.

9. MONITORING AND COMPLIANCE

9.1 Upon request, Defendant agrees to provide books, records and documents to the State at any time, and to informally, or formally under oath, provide other information and/or testimony to the State relating to compliance with this Order. Defendant shall make any requested information available within one (1) week of the request at Defendant's place of business or at such other location as is agreeable to Defendant and the Attorney General. This shall in no way limit the State's right to obtain documents, records, testimony or other information pursuant to any state or federal law, regulation, or rule.

10. PRIVATE RIGHT OF ACTION

10.1 Pursuant to Tenn. Code Ann. § 47-18-109, nothing in this Agreed Order shall be construed to affect any private right of action that a consumer may hold against Defendant.

11. PENALTY FOR FAILURE TO COMPLY

11.1 Defendant understands that failure to comply with the terms of this Order is prima facie evidence of a violation of the Tennessee Consumer Protection Act.

11.2 Defendant understands that any knowing violation of the terms of this Order is punishable by civil penalties of not more than Two Thousand Dollars (\$2,000.00) for each violation, in addition to any other appropriate sanctions, including contempt sanctions. Defendant agrees to pay all court costs and attorneys' fees associated with any successful petitions to enforce this Order against Defendant.

12. REPRESENTATIONS AND WARRANTIES.

12.1 The acceptance of this Order by the State shall not be deemed approval by the State of any of Defendant's advertising or business practices.

12.2 Defendant shall not represent or imply that any procedure or other acts or practices hereafter used or engaged in by Defendant have been approved, in whole or in part, by the State.

12.3 Defendant represents and warrants that the execution and delivery of this Order is its free and voluntary act, that this Order is the result of good faith negotiations, and that the parties believe that the Order and terms hereof are fair and reasonable. The parties warrant that they will implement the terms of this Order in good faith. Defendant further represents that the signatories for Defendant have the authority to act for and bind Defendant.

12.4 Within thirty (30) days of the entry of this Order, Defendant shall submit a copy of this Order to each of its employees, officers, directors and any third parties who act directly or indirectly on behalf of Defendant, whether as an agent or independent contractor. Within forty-five (45) days of entry of this Order, Defendant shall provide the State with an affidavit verifying and certifying that all required persons have been supplied a copy of this Order.

12.5 Defendant will not participate, directly or indirectly, in any activity to form any other entity or corporation for the purpose of engaging in acts prohibited by this Order, or for any other purpose which would otherwise circumvent any part of this Order or the spirit of this Order.

12.6 This Order constitutes the complete agreement of the parties in regard the State's Complaint. Nothing in this Order shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State of Tennessee. In addition, this Order shall not bar the State or other governmental entity from enforcing other laws, regulations or rules against Defendant.

12.7 The title and header to each section of this Order are for convenience purposes only and are not intended by the parties to lend meaning to any of the actual provisions of the Order.

12.8 This Order may only be enforced by the parties hereto. 12.9 Defendant has been advised of his right to counsel in this matter.

13. COMPLIANCE WITH ALL LAWS

13.1 Nothing in this Order shall be construed as relieving Defendant of the obligation to comply with all state and federal laws, regulations, and rules, nor shall any of the provisions of this Order be deemed to be permission to engage in any acts or practices prohibited by such law, regulation or rule.

14. APPLICABILITY OF ASSURANCE TO DEFENDANT AND ITS SUCCESSORS

14.1 Defendant agrees that the duties, responsibilities, burdens and obligations undertaken in connection with this Order shall apply to it, each of its officers, directors, managers, agents, assigns, representatives, employees, partners, subsidiaries, affiliates, parents, related entities, joint venturers, persons or other entities it controls, manages or operates, its successors and assigns, and to other persons or entities acting directly or indirectly on its or their behalf.

15. NOTIFICATION TO STATE

15.1 For five (5) years following execution of this Order, Defendant shall notify the Attorney General, c/o Consumer Protection Division, 425 5th Avenue North, Nashville, Tennessee 37243-0491, in writing at least thirty (30) days prior to the effective date of any proposed changes in their corporate structure, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or firm, the creation or dissolution of subsidiaries, or any other changes in Defendants' status that may effect compliance with obligations arising out of this Judgment.

IT IS SO ORDERED, ADJUDGED AND DECREED.